

and, most importantly for your purposes, (3) "any limitations proposed to be placed on discovery" (including requested protective orders and relief from abusive and inappropriate requests for depositions). The rule renders such a conference nondiscretionary; once a proper motion is filed, the court "shall" conduct a Rule 26(f) conference. Although few lawyers file Rule 26(f) motions, when they do they find that judges usually are receptive to narrowing the discovery issues.

Conclusion.—In determining whether and how to resist the deposition of a high-ranking official, the particular facts and needs of each case will dictate your strategy. The amendments to Rule 26 make clear that relevance is no longer the sole test of whether a deposition may go forward; the needs of the case, the amount in controversy, the resources of the parties, and the relative importance of the issues must all be considered. By using these new provisions, you may succeed in preventing, deferring, or limiting oral depositions of your client's high-ranking officials. □

Literary Trials

(Continued from page 72)

Starry Vere. Some imaginative ground for invidious comment there was. The maintenance of secrecy in the matter, the continuing all knowledge of it for a time to the place where the homicide occurred, the quarterdeck cabin; in these particulars lurked some resemblance to the policy adopted in those tragedies of the palace which have occurred more than once in the capital founded by Peter the Barbarian.

The case indeed was such that fain would the *Bellipoten*'s captain have deferred taking any action whatever respecting it further than to keep the foretopman a close prisoner till the ship rejoined the squadron and then submitting the matter to the judgment of his admiral.

But a true military officer is in one particular like a true monk. Not with more of self-abnegation will the latter

keep his vows of monastic obedience than the former his vows of allegiance to martial duty.

Feeling that unless quick action was taken on it, the deed of the foretopman, so soon as it should be known on the gun decks, would tend to awaken any slumbering embers of the Nore among the crew, a sense of the urgency of the case overruled in Captain Vere every other consideration. But though a conscientious disciplinarian, he was no lover of authority for mere authority's sake. Very far was he from embracing opportunities for monopolizing to himself the perils of moral responsibility, none at least that could properly be referred to an official superior or shared with him by his official equals or even subordinates. So thinking, he was glad it would not be at variance with usage to turn the matter over to a summary court of his own officers, reserving to himself, as the one on whom the ultimate accountability would rest, the right of maintaining a supervision of it, or formally or informally interposing at need. Accordingly, a drumhead court was summarily convened, he electing the individuals composing it: the first lieutenant, the captain of the marines, and the sailing master.

In associating an officer of marines with the sea lieutenant and the sailing master in a case having to do with a sailor, the commander perhaps deviated from general custom. He was prompted thereto by the circumstance that he took that soldier to be a judicious person, thoughtful, and not altogether incapable of grappling with a difficult case unprecedented in his prior experience. Yet even as to him he was not without some latent misgiving, for withal he was an extremely good-natured man, an enjoyer of his dinner, a sound sleeper, and inclined to obesity—a man who though he would always maintain his manhood in battle might not prove altogether reliable in a moral dilemma involving aught of the tragic. As to the first lieutenant and the sailing master, Captain Vere could not but be aware that though honest natures, of approved gallantry upon occasion, their intelligence was mostly confined to the matter of active seamanship and the fighting of demands of their profession.

The court was held in the same cabin where the unfortunate affair had taken place. This cabin, the commander's,

embraced the entire area under the poop deck. Aft, and on either side, was a small stateroom, the one now temporarily a jail and the other a dead-house, and a yet smaller compartment, leaving a space between expanding forward into a goodly oblong of length coinciding with the ship's beam. A skylight of moderate dimension was overhead, and at each end of the oblong space were two sashed porthole windows easily convertible back into embrasures for short carronades.

Billy Is Arraigned

All being quickly in readiness, Billy Budd was arraigned, Captain Vere necessarily appearing as the sole witness in the case, and as such temporarily sinking his rank, though singularly maintaining it in a matter apparently trivial, namely, that he testified from the ship's weather side, with that object having caused the court to sit on the lee side. Concisely he narrated all that had led up to the catastrophe, omitting nothing in Claggart's accusation and deposing as to the manner in which the prisoner had received it. At this testimony the three officers glanced with no little surprise at Billy Budd, the last man they would have suspected either of the mutinous design alleged by Claggart or the undeniable deed he himself had done. The first lieutenant, taking judicial primacy and turning toward the prisoner, said, "Captain Vere has spoken. Is it or is it not as Captain Vere says?"

In response came syllables not so much impeded in the utterance as might have been anticipated. They were these: "Captain Vere tells the truth. It is just as Captain Vere says, but it is not as the master-at-arms said. I have eaten the King's bread and I am true to the King."

"I believe you, my man," said the witness, his voice indicating a suppressed emotion not otherwise betrayed.

"God will bless you for that, your honor!" not without stammering said Billy, and all but broke down. But immediately he was recalled to self-control by another question, to which with the same emotional difficulty of utterance he said, "No, there was no malice between us. I never bore malice against the master-at-arms. I am sorry that he is dead. I did not mean to kill him. Could I have used my tongue I would not have struck him. But he

foully lied to my face and in presence of my captain, and I had to say something, and I could only say it with a blow, God help me!"

In the impulsive aboveboard manner of the frank one the court saw confirmed all that was implied in words that just previously had perplexed them, coming as they did from the testifier to the tragedy and promptly following Billy's impassioned disclaimer of mutinous intent—Captain Vere's words, "I believe you, my man."

Next it was asked of him whether he knew of or suspected aught savoring of incipient trouble (meaning mutiny, though the explicit term was avoided) going on in any section of the ship's company.

The reply lingered. This was naturally imputed by the court to the same vocal embarrassment which had retarded or obstructed previous answers. But in main it was otherwise here, the question immediately recalling to Billy's mind the interview with the afterguardsman in the forechains. But an innate repugnance to playing a part at all approaching that of an informer against one's own shipmates—the same erring sense of uninstructed honor which had stood in the way of his reporting the matter at the time, though as a loyal man-of-war's man it was incumbent on him, and failure so to do, if charged against him and proven, would have subject him to the heaviest of penalties; this, with the blind feeling now his that nothing really was being hatched, prevailed with him. When the answer came it was a negative.

"One question more," said the officer of marines, now first speaking and with a troubled earnestness. "You tell us that what the master-at-arms said against you was a lie. Now why should he have so lied, so maliciously lied, since you declare there was no malice between you?"

At that question, unintentionally touching on a spiritual sphere wholly obscure to Billy's thoughts, he was nonplussed, evincing a confusion indeed that some observers, such as can readily be imagined, would have construed into involuntary evidence of hidden guilt. Nevertheless, he strove some way to answer, but all at once relinquished the vain endeavor, at the same time turning an appealing glance towards Captain Vere as deeming him

his best helper and friend. Captain Vere, who had been seated for a time, rose to his feet, addressing the interrogator. "The question you put to him comes naturally enough. But how can he rightly answer it?—or anybody else, unless indeed it be he who lies within there," designating the compartment where lay the corpse. "But the prone one there will not rise to our summons. In effect, though, as it seems to me, the point you make is hardly material. Quite aside from any conceivable motive actuating the master-at-arms, and irrespective of the provocation to the blow, a martial court must needs in the present case confine its attention to the blow's consequence, which consequence justly is to be deemed not otherwise than as the striker's deed."

This utterance, the full significance of which it was not at all likely that Billy took in, nevertheless caused him to turn a wistful interrogative look toward the



speaker, a look in its dumb expressiveness not unlike that which a dog of generous breed might turn upon his master, seeking in his face some elucidation of a previous gesture ambiguous to the canine intelligence. Nor was the same utterance without marked effect upon the three officers, more especially the soldier. Couched in it seemed to them a meaning unanticipated, involving a prejudgment on the speaker's part. It served to augment a mental disturbance previously evident enough.

The soldier once more spoke, in a tone of suggestive dubiety addressing at

once his associates and Captain Vere: "Nobody is present—none of the ship's company, I mean—who might shed lateral light, if any is to be had, upon what remains mysterious in this matter."

The Trial Continues

"That is thoughtfully put," said Captain Vere; "I see your drift. Ay, there is a mystery; but, to use a scriptural phrase, it is a 'mystery of iniquity,' a matter for psychologic theologians to discuss. But what has a military court to do with it? Not to add that for us any possible investigation of it is cut off by the lasting tongue-tie of—him—in yonder," again designating the mortuary stateroom. "The prisoner's deed—with that alone we have to do."

To this, and particularly the closing reiteration, the marine soldier, knowing not how aptly to reply, sadly abstained from saying aught. The first lieutenant, who at the outset had not unnaturally assumed primacy in the court, now overrulingly instructed by a glance from Captain Vere, a glance more effective than words, resumed that primacy. Turning to the prisoner, "Budd," he said, and scarce in equable tones, "Budd, if you have aught further to say for yourself, say it now."

Upon this the young sailor turned another quick glance toward Captain Vere; then, as taking a hint from that aspect, a hint confirming his own instinct that silence was now best, replied to the lieutenant, "I have said all, sir."

The marine—the same who had been the sentinel without the cabin door at the time that the foretopman, followed by the master-at-arms, entered it—he, standing by the sailor throughout these judicial proceedings, was now directed to take him back to the after compartment originally assigned to the prisoner and his custodian. As the twain disappeared from view, the three officers, as partially liberated from some inward constraint associated with Billy's mere presence, simultaneously stirred in their seats. They exchanged looks of troubled indecision, yet feeling that decide they must and without long delay. For Captain Vere, he for the time stood—unconsciously with his back toward them, apparently in one of his absent fits—gazing out from a sashed porthole to windward upon the monotonous blank of the twilight sea. But the

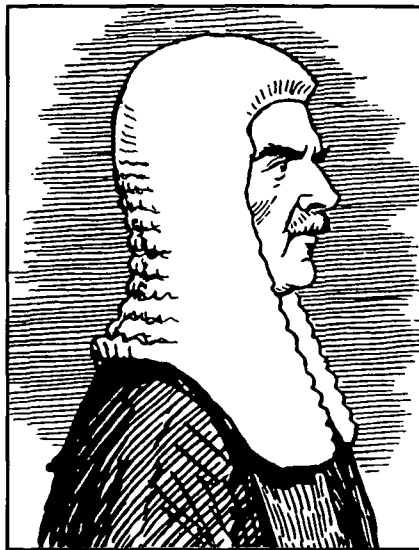
court's silence continuing, broken only at moments by brief consultations, in low earnest tones this served to arouse him and energize him. Turning, he to-and-for paced the cabin athwart; in the returning ascent to windward climbing the slant deck in the ship's lee roll, without knowing it symbolizing thus in his action a mind resolute to surmount difficulties even if against primitive instincts strong as the wind and the sea. Presently he came to a stand before the three. After scanning their faces he stood less as mustering his thoughts for expression than as one only deliberating how best to put them to well-meaning men not intellectually mature, men with whom it was necessary to demonstrate certain principles that were axioms to himself. Similar impatience as to talking is perhaps one reason that deters some minds from addressing any popular assemblies.

When speak he did, something, both in the substance of what he said and his manner of saying it, showed the influence of unshared studies modifying and tempering the practical training of an active career. This, along with his phraseology, now and then was suggestive of the grounds whereon rested that imputation of a certain pedantry socially alleged against him by certain naval men of wholly practical cast, captains who nevertheless would frankly concede that His Majesty's navy mustered no more efficient officer of their grade than Starry Vere.

What he said was to this effect: "Hitherto I have been but the witness, little more; and I should hardly think now to take another tone, that of your coadjutor for the time, did I not perceive in you—at the crisis too—a troubled hesitancy, proceeding, I doubt not, from the clash of military duty with moral scruple—scruple vitalized by compassion. For the compassion, how can I otherwise than share it? But, mindful of paramount obligations, I strive against scruples that may tend to enervate decision. Not, gentlemen, that I hide from myself that the case is an exceptional one. Speculatively regarded, it well might be referred to a jury of casuists. But for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with.

"But your scruples: do they move as in a dusk? Challenge them. Make them

advance and declare themselves. Come now; do they import something like this: If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a capital crime whereof the penalty is a mortal one. But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—



Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. Through the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King's officers lies our duty in a sphere correspondingly natural? So little is that true, that in receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now. For suppose condemnation to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.

"But the exceptional in the matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool. Ashore in a criminal case, will an upright judge allow himself off the bench to be waylaid by some tender kinswoman of the accused seeking to touch him with her tearful plea? Well, the heart here, sometimes the feminine in man, is as that piteous woman, and hard though it be, she must here be ruled out."

He paused, earnestly studying them for a moment; then resumed.

"But something in your aspect seems to urge that it is not solely the heart that moves in you, but also the conscience, the private conscience. But tell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated in the code under which alone we officially proceed?"

Here the three men moved in their seats, less convinced than agitated by the course of an argument troubling but the more the spontaneous conflict within.

Perceiving which, the speaker paused for a moment; then abruptly changing his tone, went on.

"To steady us a bit, let us recur to the facts.—In war-time at sea a man-of-war's man strikes his superior in grade, and the blow kills. Apart from its effect the blow itself is, according to the Articles of War, a capital crime. Furthermore—"

"Ay, sir," emotionally broke in the officer of marines, "in one sense it was. But surely Budd purposed neither mutiny nor homicide."

Vere Guides the Court

"Surely not, my good man. And before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit. But how here? We proceed under the law of the Mutiny Act. In feature no child can resemble his father more than that Act resembles in spirit the thing from which it derives—War. In His Majesty's service—in this ship, indeed—there are Englishmen forced to fight for the King against their will. Against their conscience, for aught we know. Though as their fellow creatures some of us may appreciate their position, yet as navy officers what reck

we of it? Still less reckes the enemy. Our impressed men he would fain cut down in the same swath with our volunteers. As regards the enemy's naval conscripts, some of whom may even share our own abhorrence of the regicidal French Directory, it is the same on our side. War looks but to the frontage, the appearance. And the Mutiny Act, War's child, takes after the father. Budd's intent or non-intent is nothing to the purpose.

"But while, put to it by those anxieties in you which I cannot but respect, I only repeat myself—while thus strangely we prolong proceedings that should be summary—the enemy may be sighted and an engagement result. We must do; and one of two things must we do—condemn or let go."

"Can we not convict and yet mitigate the penalty?" asked the sailing master, here speaking, and falteringly, for the first.

"Gentlemen, were that clearly lawful for us under the circumstances, consider the consequences of such clemency. The people" (meaning the ship's company) "have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids—they, long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. Why? they will ruminate. You know what sailors are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm—the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive. But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I

take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid."

The Court Decides

With that, crossing the deck he resumed his place by the sashed porthole, tacitly leaving the three to come to a decision. On the cabin's opposite side the troubled court sat silent. Loyal lieges, plain and practical, though at bottom they dissented from some points Captain Vere had put to them, they were without the faculty, hardly had the inclination, to gainsay one whom they felt to be an earnest man, one too not less their superior in mind than in naval rank. But it is not improbable that even such of his words as were not without influence over them, less came home to them than his closing appeal to their instinct as sea officers; in the forethought he threw out as to the practical consequences to discipline, considering the unconfirmed tone of the fleet at the time, should a man-of-war's man's violent killing at sea of a superior in grade be allowed to pass for aught else than a capital crime demanding prompt infliction of the penalty.

Not unlikely they were brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war *Somers* to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out though in a time of peace and within not many days' sail of home. An act vindicated by a naval court of inquiry subsequently convened ashore. History, and here cited without comment. True, the circumstances on board the *Somers* were different from those on board the *Bellipotent*. But the urgency felt, well-warranted or otherwise, was much the same.

Says a writer whom few know, "Forty years after a battle it is easy for a non-combatant to reason about how it ought to have been fought. It is another thing personally and under fire to have to direct the fighting while involved in the obscuring smoke of it. Much so with respect to other emergencies involving considerations both practical and

moral, and when it is imperative promptly to act. The greater the fog the more it imperils the steamer, and speed is put on though at the hazard of running somebody down. Little ween the snug card players in the cabin of the responsibilities of the sleepless man on the bridge."

In brief, Billy Budd was formally convicted and sentenced to be hung at the yardarm in the early morning watch, it being now night. Otherwise, as is customary in such cases, the sentence would forthwith have been carried out. In wartime on the field or in the fleet, a mortal punishment decreed by a drum-head court—on the field sometimes decreed by but a nod from the general—follows without delay on the heel of conviction, without appeal. □

Trial Balloon

(Continued from page 4)

plaint that seems particularly unjustified. He may be unaware of the litigation's nuances that would make the action seem more reasonable. All he knows is that someone is wasting his very limited time. That by itself may be enough to produce sanctions, with little notice and no further factual inquiry.

There simply must be better procedures before sanctions are imposed. A judge considering action under Rule 11 obviously must determine if a lawyer has made the required reasonable pre-filing inquiries. More than that, the judge must consider whether, based on the inquiry made, the lawyer could legitimately certify that the filing was well-founded.

These are not easy determinations. Often they depend on facts not in the record. Given the issues defined by the rule, it is impossible for a judge to impose sanctions without taking evidence and, very often, without conducting a hearing. The kind of abrupt action in cases like *Roberts v. Ace Hardware, Inc.*, 779 F.2d 52 (6th Cir. 1985), and *Rodgers* cannot be justified.

Sound procedures are needed for more reasons than just careful fact-finding. What is involved are basic con-

Literary Trials

Billy Budd, Sailor

by Herman Melville



Excerpted from *Billy Budd, Sailor*, by Herman Melville, ed. Hayford & Sealts, Chapter 21, by permission of The University of Chicago Press. © 1962 by The University of Chicago. All rights reserved.

Billy Budd is a sailor impressed into service on H.M.S. Bellipotent. Called the Handsome Sailor, Billy is loved by the crew—but not by Claggart, the ship's master-at-arms. Claggart falsely tells the ship's Captain Vere that Billy is a "dangerous character" who is spreading mutiny among the men. Captain Vere summons Claggart and Billy to his cabin, where he orders Claggart to repeat his accusations. Then Captain Vere commands Billy, "Speak! Defend yourself!" Billy's amazement at Claggart's accusation makes him tongue-tied. Billy still can move, however; he strikes Claggart once, and Claggart drops to the deck.

Captain Vere calls the ship's surgeon to confirm that Claggart is dead, and tells him he will call a drumhead court—a court martial held in the field for immediate trial of offenses committed during military operations. The ship's surgeon thinks the decision is impolitic; together with Vere's excited manner, it makes him wonder if the captain has become unhinged.

—Ed.

Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blendingly enter into the other? So with sanity and insanity. In pronounced cases there is no question about them. But in some supposed cases, in various degrees supposedly less pronounced, to draw the exact line of demarcation few will undertake, though for a fee becoming considerable some professional experts will. There is nothing namable but that some men will, or undertake to, do it for pay.

Whether Captain Vere, as the surgeon professionally and privately surmised,

was really the sudden victim of any degree of aberration, every one must determine for himself by such light as this narrative may afford.

That the unhappy event which has been narrated could not have happened at a worse juncture was but too true. For it was close on the heel of the suppressed insurrections, an aftertime very critical to naval authority, demanding from every English sea commander two qualities not readily interfusible—prudence and rigor. Moreover, there was something crucial in the case.

In the jugglery of circumstances preceding and attending the event on board the *Bellipotent*, and in light of that martial code whereby it was formally to be judged, innocence and guilt personified in Claggart and Budd in effect changed places. In a legal view the apparent victim of the tragedy was he who had sought to victimize a man blameless; and the indisputable deed of the latter, navally regarded, constituted the most heinous of military crimes. Yet more. The essential right and wrong involved in the matter, the clearer that might be, so much the worse for the responsibility of a loyal sea commander, inasmuch as he was not authorized to determine the matter on that primitive basis.

Small wonder then that the *Bellipotent's* captain, though in general a man of rapid decision, felt that circumspectness not less than promptitude was necessary. Until he could decide upon his course, and in each detail; and not only so, but until the concluding measure was upon the point of being enacted, he deemed it advisable, in view of all the circumstances, to guard as much as possible against publicity. Here he may or may not have erred. Certain it is, however, that subsequently in the confidential talk of more than one or two gun rooms and cabins he was not a little criticized by some officers, a fact imputed by his friends and vehemently by his cousin Jack Denton to professional jealousy of
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